

**State of Michigan
In the Supreme Court**

Appeal from the Michigan Court of Appeals
Michael R. Smolenski, Presiding Judge
Helene N. White, Judge
Kirsten Frank Kelly, Judge

DANIEL LEE STRAUB,
Plaintiff-Appellee,

v

PHILLIP MICHAEL COLLETTE
and TERESA M. HEIL-WYLIE,
jointly and severally,
Defendants-Appellants.

Docket No. 124757
Court of Appeals No: 236505
Civil Action No: 00-11405-NI

Brief on Appeal — Appellee

Oral Argument Requested

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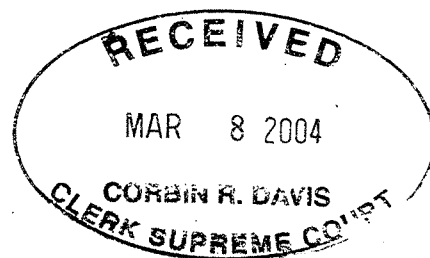


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**COUNTER-STATEMENT OF THE BASIS OF JURISDICTION OF THE MICHIGAN
SUPREME COURT**

Pursuant to MCR 7.212(D)(2) as cross referenced in MCR 7.306(A), Plaintiff-Appellee submits that Defendants-Appellants Statement of the Basis of Jurisdiction of the Supreme Court is complete and correct in compliance with MCR 7.212©)(4) as cross referenced in MCR 7.306(A).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I.

PURSUANT TO MCL 500.3135(7), DID THE MICHIGAN COURT OF APPEALS PROPERLY APPLY THE CORRECT SUBJECTIVE STANDARD, THAT BEING WHETHER PLAINTIFF-APPELLEES OBJECTIVELY MANIFESTED IMPAIRMENTS OF IMPORTANT BODY FUNCTION AFFECTED HIS GENERAL ABILITY TO LEAD HIS NORMAL LIFE, BY CONSIDERING THE AFFECT NOT ONLY ON HIS EMPLOYMENT AND GUITAR PLAYING BUT ALSO ON THE AFFECT ON HIS PERFORMANCE OF NUMEROUS HOUSEHOLD AND PERSONAL TASKS, OPERATING HIS BOW SHOP, PROCESSING DEER DURING THE 1999 DEER SEASON, AND HIS CONTINUING INABILITY TO COMPLETELY CLOSE HIS LEFT HAND, AMONG OTHER THINGS AND REACH THE CORRECT CONCLUSION BASED ON THIS REVIEW THAT THE IMPAIRMENTS DID IN FACT AFFECT PLAINTIFF-APPELLEES GENERAL ABILITY TO LEAD HIS NORMAL LIFE?

Trial Court did not have an opportunity to answer this specific question.

Michigan Court of Appeals answers: Yes

Defendants-Appellants answer: No

Plaintiff-Appellee answers: Yes

II.

PURSUANT TO MICHIGAN LAW, IN FAILING TO RAISE THE ISSUE AS TO WHETHER PLAINTIFF-APPELLEE'S OBJECTIVELY MANIFESTED INJURIES IMPAIRED AN IMPORTANT BODY FUNCTION BEFORE NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS, HAS THE ISSUE BEEN IMPROPERLY PRESERVED FOR APPEAL SO AS TO PRECLUDE DEFENDANTS-APPELLANTS FROM RAISING IT FOR THIS HONORABLE COURTS CONSIDERATION FOR THE FIRST TIME IN THIS APPEAL?

Trial Court did not did not have an opportunity to answer.

Michigan Court of Appeals did not have an opportunity to answer.

Defendants-Appellants answer: No

Plaintiff-Appellee answers: Yes

COUNTER-STATEMENT OF FACTS

A. Material Facts

On September 19th, 1999, at approximately 5:40 p.m., Plaintiff was driving his 1981 Harley Davidson motorcycle westbound on —50 in Dundee, when he was involved in an accident with a 1988 Ford Taurus being driven by Defendant Phillip Michael Collette and owned by both Defendants. After the impact, Plaintiff looked at his hand and “First thing I saw was palm of my hand had a piece of meat hanging down here and I looked at the front of my hand it just really tore up bad.” [37a] Plaintiffs also suffered a skinned left elbow and right shoulder blade, and a bruised knee. [37a]

Plaintiff was taken to St. Joseph Hospital that day by ambulance where they cleaned his wounds, stitched his left palm back together, and placed his hand in a plaster splint pending an exploratory operation to examine the wounds and repair tendons as needed. [37a] [20a]

Plaintiffs then treated with Dr. Hogikyan at Community Orthopedic Surgery & Huron Valley Hand Surgery on September 21st, 1999. Plaintiff was diagnosed as having suffered a closed left fifth metacarpal displaced neck fracture (boxer’s fracture) as well as open wounds of his long and ring fingers, including extensor tendon injuries. Plaintiff’s left hypothenar eminence tissue avulsion was also noted. Exploratory surgery for his finger wounds was recommended to repair the tendons as needed. [21a]

Plaintiff underwent this surgery on September 23rd, 1999 at St. Joseph Hospital, performed by Dr. Hogikyan. The doctor removed some foreign material from Plaintiff’s palm wound, excised some subcutaneous fat and skin margin, and closed the wound. With respect to the ring finger, it was noted that Plaintiff had “disrupted the radial lateral band and the central slip.” Thus, Plaintiff’s

PIP joint was pinned in full extension. [7b] With respect to the middle finger, there was a “complete transection at the radial lateral band and near complete transection at the ulnar lateral band” with “gapping of the tendon.” Thus, Plaintiffs’s DIP joint was pinned in full extension. [7b] [22a-24a]

On September 28th, 1999, Dr. Hogikyan recommended placing Plaintiff in a three finger ulnar gutter cast in place of his current cast, and instructed Plaintiff to work on motion for his thumb and index finger. [25a] On October 19th, 1999, Dr. Hogikyan referred Plaintiff to hand therapy to begin mobilizing the joints which were not pinned and to fit him for the ulnar gutter splint. [26a]

On November 2nd, 1999, the pins were removed from Plaintiff’s hand. Although Plaintiff had been attending therapy, it was noted that “he still has significant restrictions of motion.” Thus, Plaintiff was made to continue therapy to resume his program for all-nonpinned joints, and slowly start to include the joints that were pinned in two weeks time. Plaintiff’s work status was continued as being “no use of his left hand” until Dr. Hogikyan released Plaintiffs for “full duty without restriction as of December 14th.” [27a] [28a]

At the time of the accident, Plaintiff was employed as a cable lineman for a cable television company. [35a] Plaintiff also played bass guitar for the band “Summer Rain” at the time of the accident. [34a] He would play every weekend on both Friday and Saturday nights, performing mostly in nightclubs and private clubs, making \$150.00 to \$200.00 per week. [34a] Plaintiffs returned to his cable work part time under the “no use of his left hand” restriction, working 20 or 25 hours per week, around the third week of November of 1999. [39a] During this part time work, Plaintiff only did “leg-work” and avoided all use of his left hand. [42a] At the end of December, Plaintiff returned to work full time hours. [39a]

From the date of the accident, up until his return to full time work in December, Plaintiff was

either unable to perform, or experienced significant difficulty performing various tasks which resulted in a significant compromise in his ability to live his normal life for this period of time. This included a complete inability to wash dishes, do yardwork and property repairs, and operate his bow shop and process deer during the deer season of 1999, among other things. Without the use of his left hand, Plaintiff experience significant difficulty with simple things like dressing himself and showering as well. [43a-44a]

Further, although he returned to full time work at the end of December, it was not until the middle of January of 2000, after missing approximately 15 or 20 shows, that Plaintiff's hand was physically able and strong enough to play bass guitar for his band again. [39a] His left hand is responsible for handling the "fret work" on the neck of the guitar, and even though he returned to the band, he had to adapt to a different finger formation which still resulted in sore fingers at the end of a night of playing. [42a]

Currently, Plaintiffs's left middle finger's first joint is unable to completely straighten out. [28a] For this and other reasons, he attributes his hand at operating at "maybe 90%." [39a] The lacking 10% is attributable to the fact that Plaintiffs is unable to completely close his left hand, which lessens his strength and ability to grip objects. [29a] [40a] This condition worsens in the winter weather. [40a] This lack of strength and inability to grip has given him problems in his normal life, requiring him to make adjustments to compensate for his injury in both his work life and personal life. [39a] Also, the injuries left Plaintiff with 2" by 1" scars on the top of his left hand and a noticeable scar on his palm at the wrist joint. [29a-30a] [42a]

B. Material Proceedings

On July 6th, 2001, Plaintiff-Appellee was served with Defendants-Appellants Motion for

Summary Disposition and Supporting Brief, filed pursuant to MCR 2.116©)(10) alleging that “Plaintiff has not suffered a threshold injury as required by the Michigan No-Fault Statute, namely MCL 500.3135.” [Defendant’s Motion, 1] Plaintiff-Appellee timely filed a Response to Motion for Summary Disposition Filed by Defendants Collette and Heil-Wylie, alleging there in fact does exist a genuine issue as to whether Plaintiff-Appellee has suffered a serious impairment of body function as defined in M.C.L 500.3135. The motion hearing was held on August 10th, 2001 in the Thirty-Eighth Judicial Circuit Court for Monroe County, at which time Judge Michael W. LaBeau put his decision on the record and entered an order granting Defendants-Appellants Motion for Summary Disposition, finding that “Plaintiff presents only arguments that relate to . . . extrinsic . . . considerations such as guitar playing and deer processing.”, and that Plaintiff-Appellee’s injury “does not rise to the level of being a threshold injury.” [9a]

On August 29th, 2002, Plaintiff-Appellee timely filed a Claim of Appeal with the Michigan Court of Appeals from the lower court order. Both parties timely filed briefs on appeal and the Michigan Court of Appeals issued a published opinion on December 20th, 2002 which reversed the lower court’s grant of summary disposition and remanded the case to the lower court for further proceedings consistent with the opinion. [11a-13a]

Defendants-Appellants filed an Application for Leave to Appeal from the December 2002 Court of Appeals opinion with this Honorable Court on or about January 10, 2003. Plaintiff-Appellee filed a Brief in Opposition to Application for Leave to Appeal with this Honorable Court on February 3, 2003. On or about March 6, 2003, Defendants-Appellants filed a Reply Brief in Support of Application for Leave to Appeal with this Honorable Court. On June 12, 2003 this Honorable Court entered it’s order which, “in lieu of granting leave to appeal”, vacated the judgment

of the Court of Appeals and remanded the matter back to the Court of Appeals “for consideration in light of this Court’s April 9, 2003 Order in *Kreiner v Fischer*, 468 Mich 884, 661 NW2d 234 (2003). [15a][14a] In this Court’s remand order in *Kreiner*, it was held that in reaching a determination as to whether an impairment has affected one’s general ability to lead his normal life, “Although a *serious* effect is not required, *any* effect does not suffice either. Instead the effect must be on one’s *general* ability to lead his normal life.” [14a](emphasis in original).

On July 15, 2003, Defendants-Appellants filed a Motion for Leave to File Brief on Remand and Defendants-Appellants Brief on Remand. Plaintiff-Appellee then filed his Response Brief on Remand on or about August 18, 2003. On September 16, 2003, the Court of Appeals issued another published opinion on remand, wherein it again reversed the Circuit Court’s granting of summary disposition to Defendants-Appellants and remanded the case back to the Circuit Court for further proceedings.¹ [16a-19a]

Defendants-Appellants filed an Application for Leave to Appeal from the September 2003 Court of Appeals opinion with this Honorable Court on or about October 7, 2003. Plaintiff-Appellee filed a Brief in Opposition to Application for Leave to Appeal with this Honorable Court on or about October 31, 2003. On November 6, 2003 this Honorable Court entered it’s order which granted Defendants-Appellants Application for Leave to Appeal and further ordered that “this case be argued

¹As the Court of Appeals did in the case at bar, it also again reversed the trial court’s judgment granting defendant’s motion for summary disposition in *Kreiner* on remand on June 3, 2003 in a published opinion which noted that “Our Supreme Court’s order does not change in any manner a significant portion of our analysis in the previous opinion;”. *Kreiner v Fischer*, 256 Mich. App. 680, 681 (2003).

and submitted to the Court together with the case of *Kreiner v Fischer* (Docket No. 124120), at such future session of the Court as both cases are ready for submission.” [8b] On or about December 12, 2003, Defendants-Appellants filed with this Honorable Court Defendants-Appellants Motion to Extend Time for Filing Brief on Appeal and Appendix and subsequently filed Appellants Brief on Appeal and Appellant’s Appendix with this Honorable Court on January 20, 2004. Also, on or about January 20, 2004, Insurance Institute of Michigan filed with this Honorable Court its Motion for Leave to File Amicus Curiae Brief and Participate in Oral Arguments and its Amicus Curiae Brief on Appeal. On or about January 26, 2004, Plaintiff-Appellee filed with this Honorable Court Plaintiff-Appellees Motion to Extend Time for Filing Brief on Appeal and Appendix seeking to extend the deadline to March 8, 2004. On February 6, 2004, this Honorable Court entered an Order extending the time for Defendants-Appellants to file their Brief and Appendix to January 20, 2004, and granting Insurance Institute of Michigan leave to file a Brief amicus curiae but denying its request to participate in oral argument. [9b] Plaintiff-Appellee will have filed Appellees Brief on Appeal and Appellee’s Appendix with this Honorable Court on March 8, 2004.

SUMMARY OF ARGUMENT - I

The Michigan No Fault Automobile Insurance Act, as subsequently amended by 1995 PA 222, is the act which is at issue in this case. Specifically, MCL 500.3135(7) defines “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” A plaintiff’s injuries must qualify as a “serious impairment of body function” in order to make a claim for noneconomic damages against the party felt to be responsible in tort for causing the auto accident. The plain and unambiguous language of the statute demonstrates the inquiry is subjective, focusing on the affect of the impairment on the individual plaintiff’s general ability to lead what constituted his normal life. An impairment need not be permanent to be deemed a “threshold injury.” Once a plaintiff proves that he has suffered a serious impairment of body function, he can recover all of his noneconomic losses, even for periods when the impairment is no longer serious.

In applying MCL 500.3135(7) to the facts of the case at bar, the Court of Appeals on remand came to a proper determination that Plaintiff-Appellees hand injuries did qualify as a “serious impairment of body function.” This finding was not based on focusing on the affect on any one factor, was based on examining all aspects of the plaintiff’s normal life, including employment, home life, relationships, daily activities, and recreational activities. For a period of approximately four months after the accident, Plaintiff-Appellees was impaired in his ability to work, perform

ARGUMENT

I.

PURSUANT TO MCL 500.3135(7), THE MICHIGAN COURT OF APPEALS PROPERLY APPLIED THE CORRECT SUBJECTIVE STANDARD, THAT BEING WHETHER PLAINTIFF-APPELLEES OBJECTIVELY MANIFESTED IMPAIRMENTS OF IMPORTANT BODY FUNCTION AFFECTED HIS GENERAL ABILITY TO LEAD HIS NORMAL LIFE, BY CONSIDERING THE AFFECT NOT ONLY ON HIS EMPLOYMENT AND GUITAR PLAYING BUT ALSO ON THE AFFECT ON HIS PERFORMANCE OF NUMEROUS HOUSEHOLD AND PERSONAL TASKS, OPERATING HIS BOW SHOP, PROCESSING DEER DURING THE 1999 DEER SEASON, AND HIS CONTINUING INABILITY TO COMPLETELY CLOSE HIS LEFT HAND, AMONG OTHER THINGS AND REACHED THE CORRECT CONCLUSION BASED ON THIS REVIEW THAT THE IMPAIRMENTS DID IN FACT AFFECT PLAINTIFF-APPELLEES GENERAL ABILITY TO LEAD HIS NORMAL LIFE.

A. Standard of Review

Appellate courts review orders granting summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337, 572 NW2d 201 (1998). "In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition. *Maiden v Rozwood*, 461 Mich 109, 597 NW2d 817 (1999) (citing *Groncki v Detroit Edison*, 453 Mich 644, 649, 557 NW2d 289 (1996) (opinion of Brickley, C.J.). "This Court must review the record in the same manner as the trial court to determine whether the nonmoving party was entitled to judgment as a matter of law." *Phillips v Deihm*, 213 Mich App 389, 541 NW2d 566 (1995).

"When reviewing a motion for summary disposition brought pursuant to MCR 2.116©)(10), we consider all documentary evidence available to us in a light most favorable to the nonmoving party in order to determine whether there is a genuine issue with respect to any material fact." *Quinto v Cross & Peters Co.*, 451 Mich 358, 362, 547 NW2d 314 (1996). "The nonmoving party

may nor rely on allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Smith v Globe Life Ins. Co.*, 460 Mich 44, 597 NW2d 28 (1999). The nonmoving party must, by affidavits, depositions, admissions and other documentary evidence offered in opposition to the motion which would be admissible as evidence to deny the grounds set forth in Defendants' Motion, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4), (6).

B. The Michigan No-Fault Automobile Insurance Act, As Amended By 1995 PA 222, Sets Forth The "Threshold Injury" Requirement That Needs To Be Satisfied In Order For A Plaintiff To Hold A Driver Of A Motor Vehicle Liable In Tort For Noneconomic Loss.

The Michigan No Fault Automobile Insurance Act (MCL 500.3101 et. seq.) went into effect on October 1, 1973 and provides those persons involved in a motor vehicle accident with two types of claims. The first type allows an injured person to make a claim for certain benefits including but not limited to lifetime medical expenses, wage loss and replacement services for three years after the accident, all regardless of who was at fault for causing the accident. This type of claim is commonly referred to as a "PIP claim", as it is for personal protection insurance benefits. The second type allows the injured party to make a claim for noneconomic damages and excess economic loss not covered under the PIP claim against the party felt to be responsible in tort for causing the accident.

Prior to the date the Act went into effect, the Michigan Legislature on October 31, 1972 enacted PA 294 "to Amend the Title of Act No. 218 of the Public Acts of 1956" and to add Chapter 31 to the Insurance Code of 1956. Two phrases were deleted from the title and two were added. The provision of Chapter 31 pertinent to the case at bar was set forth at MCL 500.3135(1) which reads in part, "A person remains subject to tort liability for noneconomic loss caused by his ownership,

maintenance or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function or permanent serious disfigurement.”

The Michigan No Fault Automobile Insurance Act, as subsequently amended by 1995 PA 222, is the act which is at issue in this case. MCL 500.3135(1), as discussed above sets forth the requirement that needs to be satisfied in order for a plaintiff to hold the party felt to be responsible in tort for plaintiff’s noneconomic loss. However, the addition of MCL 500.3135(7) proceeded to define “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” Prior to this statute, the term “serious impairment of body function had never been defined by the Legislature and it was up to the courts of this State to provide meaning to the term.

1. *Advisory Opinion re Constitutionality Of 1972 PA 294*

This Court issued an *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 208 NW2d 469 (1973), finding the statute to be constitutional on June 18, 1963. The circumstances leading to the issuing by this Court of it’s Advisory Opinion were requests by then Governor William G. Milliken, acting pursuant to art 3, § 8, of the Const of 1963, and by the Senate via Senate Resolution 336, for an advisory opinion with respect to 1972 PA 294. *Id.* at 460. Of the three questions before this Court, the question pertinent to the case at bar was the third, being “Are the phrases ‘serious impairment of body function’ and ‘permanent serious disfigurement’ as used in § 3135 of the Act ‘sufficient for legal interpretation?’”² *Id.* at 462. This Court held that “such phrases

²The first question was “Does the act embrace more than one object in violation of the following Michigan constitutional limitation: ‘No law shall embrace more than one object, which shall be expressed in its title.’ Const 1963, art 4, § 24.” *Id.* at 462. The second question was “Does the ‘modification or amendment by reference of any other Michigan statutory provisions

are capable of legal interpretation”, stating,

indeed, that juries or judges sitting without juries frequently have and do interpret comparable phrases bearing upon various facets of the law. Such findings result from denominated fact questions and thus are within the exclusive province of the triers of fact. Only when interpretation approaches or breaches permissible limits does it become a question of law for the Court. Such questions must be approached on a case by case basis.

Id. at 477-478. This Court reasoned that “Phrases comparable to ‘permanent serious disfigurement’ have confronted courts over the years and there has been no apparent reluctance to construe the terminology.” *Id.* at 479. This Court also noted that a reading of the Standard Jury Instructions indicate the wide range of questions which triers of fact are asked to decide including, “what a reasonably care person would do or not do” under the circumstances, questions of “willful and wanton misconduct”, “gross negligence”, and “proximate cause” among others. *Id.* at 480. Thus, given the above reasoning and rules of statutory construction, this Court concluded,

Clearly the subject phrases ‘serious impairment of body function’ and ‘permanent serious disfigurement’ as used in § 3135 of this act are comprised of no less commonly used or understood words of the English language, nor is the language presently before the Court less precise than that which has been adopted to express other standards for determining tort liability. The phrases are within the province of the trier of fact and are sufficient for legal interpretation.

Id. at 481. With this Court having found the statute to be constitutional, Michigan courts were then

with respect to the substantive law of torts by reason of section 3135' violate the following Michigan constitutional limitation: ‘No law shall be revised, altered or amended by reference to its title only. The section or sections of the Act altered or amended shall be reenacted and published at length.’ Const 1963, art 4, § 25. *Id.* at 462. In finding the statute to be constitutional, this Court answered both questions in the negative. *Id.* at 463, 477.

put to the task of defining and applying the term “serious impairment of body function.”

In the years after the Advisory Opinion, up until this Court’s next decision on the issue of “serious impairment of body function” in *Cassidy v McGovern* in 1982, the prevailing rule of the Michigan Court of Appeals was to submit the question to a jury unless no reasonable mind could differ as to the answer, in which case the trial judge would rule whether an injury qualified as a “serious impairment of body function” as a matter of law. *McKendrick v Petrucelli*, 71 Mich App 200, 247 NW2d 349 (1976); *Vitale v Danylak*, 74 Mich App 615, 254 NW2d 593 (1977). Other general rules instructive on deciding the threshold issued by the Michigan Court of Appeals during this period included that the impairment of body function need not be permanent to otherwise qualify and that the injury need not be an impairment of the total body function but only of a particular body function. *Stevens v Hogue*, 85 Mich App 185, 270 NW2d 735 (1978); *Cassidy v McGovern*, 86 Mich App 321, 272 NW2d 644 (1978); *Smith v Sutherland*, 93 Mich App 24, 285 NW2d 784 (1979).

2. *Cassidy v McGovern*

The first keynote case to be decided by the Michigan Supreme Court since the Advisory Opinion, which addressed the concept of “serious impairment of body function” pursuant to Michigan No-Fault law was *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982). This court initially was asked to decide whether the determination of if a specific injury met the threshold requirement of a “serious impairment of body function” is a fact question for the trier of fact, or whether it requires judicial determination as a matter of law. *Id.* at 501. *Cassidy* reasoned first, that “it is not a term commonly used, for which juries would have a clear sense of the intended meaning.” *Id.* Second, *Cassidy* found that as the term is unspecific and could lead reasonable minds to differ,

if the determination were left to a trier of fact this would require a trial in most instances which would cut against reducing litigation in automobile accident cases which was one important reason behind the No-Fault Act in the first place. *Id.* Finally, *Cassidy* reasoned that there would be a greater likelihood of uniformity in the term's application if the question were left in the hands of the appellate courts, and "the question whether tort immunity attaches is not a question which we believe the Legislature intended to leave as primarily a question for the trier of fact." *Id.* at 502. Thus, *Cassidy* concluded that

the meaning of 'serious impairment of body function' is a matter to be determined by statutory construction. We hold that when there is no factual dispute regarding the nature and extent of a plaintiff's injuries, the question of serious impairment of body function shall be decided as a matter of law by the court. Likewise, if there is a factual dispute as to the nature and extent of a plaintiff's injuries, but the dispute is not material to the determination whether plaintiff has suffered a serious impairment of body function, the court shall rule as a matter of law whether the threshold requirement of M.C.L. S 500.3135; M.S.A. S 24.13135 has been met.

Id. at 502. *Cassidy* went on to describe the threshold as a "significant obstacle to maintaining a tort action for noneconomic damages." *Id.* at 503.

Next, *Cassidy* held that the plaintiff must demonstrate an "objectively manifested injury." No definition of "objectively manifested injury" was given in the opinion, other than to note that proof of the injury had to be supported by more than just "serious pain and suffering". *Id.* at 505. *Cassidy* went on to hold that the injury must be an impairment of an important body function, and although it must be serious, it need not be permanent. *Id.* at 504-506. The opinion did not offer much elaboration on which body functions were "important."

Finally, *Cassidy* held that in determining whether the injury meets the threshold, an objective

standard is to be used which evaluates the effect of the injury on the person's "general ability to live a normal life." *Id.* at 505. The opinion was completely silent on what was meant by "general ability" and offered no indication as to what constituted "a normal life."

Cassidy realized that "serious impairment of body function" was not an easily definable term, and it would have to be developed over time on a case by case basis, explaining,

'Serious impairment of body function' obviously is not susceptible of a simple definition that will determine the outcome in all cases. **Absent specifics from the Legislature**, its character will of necessity have to develop **on a case-by-case basis**. As more cases are decided, it should become clearer what types of injuries are of sufficient gravity to meet the threshold. **We seek to do no more than provide an interpretation that addresses the significant aspects of the cases presently before us.**

Id. at 502-503.

3. *Byer v Smith*

In *Byer v Smith*, 419 Mich 541, 357 NW2d 644 (1984), a specific question was directed to this Court with respect to the "serious impairment of body function" threshold. That question was "whether a person who is seriously impaired in body function may recover damages for pain and suffering and other sequelae of the injury after the impairment is no longer serious." *Id.* at 544. This Court in no unspecific terms answered, "We hold that he may." *Id.* at 544. Specifically acknowledging that a person may recover from a serious impairment of body function, *Byer* explained its holding by stating,

Once the plaintiff establishes serious impairment, he may maintain an action for noneconomic loss. The tort measure of damages requires the factfinder to make a prediction regarding future damages. There can thus be only one lawsuit and only one assessment of damages. . . . It is our understanding that the Legislature's purpose in establishing the criteria of death, permanent serious disfigurement, and serious impairment of body function, was simply to weed out from the tort system claims for injuries less severe than the criteria. The Legislature might have gone further, and the

serious impairment language could indeed be construed to bring about such a result. But no other state has enacted a continuing limitation of the kind that the defendants contend the Michigan Legislature enacted. . . . the criteria for determining whether a tort action can be maintained seek, as does the Michigan act, to preserve tort liability where the injury is serious or severe. Neither model act and no state act seek to guard against recovery in tort for sequelae suffered after the injury ceases to be serious or severe. Recognizing the force of the defendant's argument, we believe that while Michigan's unique "serious impairment of body function" terminology could, on that basis, be construed as a continuing limitation, it is more likely that the Legislature had no such larger purpose in mind and did not intend to enact a limitation on tort liability that functions other than, as under the model acts and other state acts, as a threshold.

Id. at 545-547. Thus, once a plaintiff proves that he has suffered a serious impairment of body function, he can recover all of his noneconomic losses, even for periods when the impairment is no longer serious. *Id.*

4. ***DiFranco v Pickard***

Exactly four years and approximately forty published post-*Cassidy* Court of Appeals decisions later, this Court readdressed the same issue that *Cassidy* presented, in the case of *DiFranco v Pickard*, 427 Mich 32, 398 NW2d 896 (1986). *DiFranco* went through a lengthy discussion of the history of the No-Fault Act and examined the threshold requirement in other states before entering into an evaluation of *Cassidy*, which this Court called it's "first attempt to define what constitutes a 'serious impairment of body function,' what evidence is needed to meet this threshold, and when the issue should be submitted to the factfinder." It is apparent from this comment that the interpretation of the threshold would be a work in the making, just as *Cassidy* itself had stated. As the approximately forty post-*Cassidy* Court of Appeals decisions were often conflicting and had not lent a clear definition as to what types of injuries met the threshold, *DiFranco* took it's opportunity to reexamine and clarify each major holding of *Cassidy*.

Initially, *DiFranco* disagreed with *Cassidy*'s conclusion that a jury would be unable to understand the component parts of the phrase "serious impairment of body function." *DiFranco* at 54. *DiFranco* also took issue with *Cassidy*'s concern that allowing a jury to decide the threshold issue would dramatically increase litigation, pointing out that "no-fault acts were designed primarily to reduce the number of cases seeking damages for *economic* loss, e.g., wage loss, survivor's loss, and medical expenses."³ *DiFranco* at 55. Thus, the intent of the No-Fault Act is not compromised by allowing a jury to decide the threshold issue. Finally, as to *Cassidy*'s assertion that allowing courts to decide the threshold issue as opposed to triers of fact would create more uniformity in decisions, *DiFranco* correctly pointed out that "trial and appellate courts have proven to be no more consistent than juries would have been in determining whether a particular plaintiff suffered a serious impairment of body function." *Id.* at 56. Therefore, *DiFranco* modified the portion of *Cassidy* which held that the trial court must decide the threshold issue whenever there is no material factual dispute as to the nature and extent of the plaintiff's injuries, by holding, if when the evidence is viewed in a light most favorable to the nonmoving party, reasonable minds can differ as to whether the plaintiff suffered a serious impairment of body function, the issue must be submitted to the jury, even if the evidentiary facts are undisputed." *DiFranco* at 58,69. This Court noted that this holding reflected a return to the rules articulated in its Advisory Opinion and the Court of Appeals cases consistent with that Opinion. *Id.* at 58.

Further, *DiFranco* lent a definition to "objectively manifested impairment", stating that such requirement necessitates a Plaintiff to only submit evidence of a "medically identifiable injury" that

³This, contrary to Plaintiff-Appellants assertion at page 10 of their Brief that it was the Legislature's intent to maintain the "high" tort threshold of *Cassidy* to minimize tort litigation.

establishes “a physical basis for their subjective complaints and pain.” *Id.* at 74-75. *DiFranco* stated that medical evidence will usually be required in this regard, and implied that an expert’s diagnosis along with the basis for it (ex. Plaintiff’s complaints, doctor’s observations and test results) may suffice. *Id.* at 74-75.

DiFranco also disavowed *Cassidy* by holding that although the No-Fault Act bars recovery of damages to those suffering minor injuries or injuries which do not seriously impair the ability to function, the impairment need not be of the entire body function or of an important body function. *DiFranco* at 61. *DiFranco* characterized *Cassidy*’s requirement that the impaired body function be important as being “judicially engrafted”. *DiFranco* at 61-62. *DiFranco* reasoned,

Rather than judicially imposing a requirement which the Legislature clearly rejected, it would be preferable to focus on the Legislature’s overall intent to bar recovery of noneconomic damages to those who suffered minor or superficial injuries. It may be possible to describe a minor injury as a serious impairment of some body function. However, we believe the judiciary is fully capable of weeding out trivial cases without having to determine whether the body function impaired is important.

Id. at 61-62.

Finally, contrary to *Cassidy*, the *DiFranco* decision held that in determining whether one has suffered a serious impairment of body function, the “general ability to live a normal life” test is **no longer applicable** because “the most obvious problem is defining what constitutes ‘a normal life.’” *DiFranco* at 61. (Emphasis added) The court pointed out that the Court of Appeals had never attempted to define what “a normal life” is. *Id.* The court also criticized the Court of Appeals application of this objective test by stating:

In short, the Court of Appeals has strictly applied the “general ability to live a normal life” test. If the plaintiff can perform common day-to-day activities, albeit with some difficulty, or can eventually return to work, the plaintiff is usually deemed not to have suffered a

serious impairment of body function. The bottom line is that few plaintiffs have been given the opportunity to recover noneconomic damages since Cassidy was decided.

Id. at 64-65. This Court continued, explaining why a test which analyzed the effect on a person's ability to live his or her own life was equally ineffective:

Focusing on the effect an injury has on a particular person's life can lead to anomalous results. Suppose a concert violinist sustains severe permanent injuries to his legs in an auto accident and is required to use a wheelchair. If the violinist previously lived a sedentary life and has a good mental outlook, the injury may not seriously affect his daily routine, work, or recreational activities. However, he has clearly suffered a serious impairment of body function.

Suppose the same violinist suffers a permanent loss of dexterity in his little finger. Although the injury does not prevent the violinist from performing routine tasks with his hand, the injury has effectively ruined his performing career. The violinist undoubtedly suffers more mental anguish than a similarly injured soccer player. However, the "serious impairment of body function" threshold bars recovery of noneconomic damages for minor injuries, regardless of how seriously the injury affects a particular person's life. The violinist can only recover his medical expenses and wage loss.

Id. at 65-66⁴.

Finding that the "general ability to live a normal life" test to be an "insurmountable obstacle" to being able to recover noneconomic damages, this Court discarded this test in

⁴The argument concluding at page 36 of Defense Amicus IIM wherein they make a hypothetical out of this fact scenario basically stating that a violinist with a permanent loss of dexterity in a little finger would not meet the 'general ability to lead a normal life' test." was taken **completely** out of context, as can be seen by reading the context in which this example was made in *DiFranco*. As this Court can see, the hypothetical that IIM refers to was used in *DiFranco* precisely to explain why the "general ability to lead a normal life" standard and a more subjective standard were equally **ineffective**.

DiFranco. In its place, *DiFranco* proposed two objective inquiries: 1) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?; and 2) Was the impairment serious? *DiFranco* at 65-67. In determining the seriousness of an impairment, *DiFranco* referred to, among other things, the extent of the impairment, the particular body function impaired, length of time the impairment lasts, the type of treatment required to rectify the impairment and a comparison of the plaintiff's activities and abilities before the impairment. *Id.* at 67-68. *DiFranco* stressed that this test places the affect of the injury on the plaintiff's body functions as the "paramount consideration", rather than the affect of the injury on the plaintiff's (or a hypothetical person's) life. *Id.* at 68-69. **One of the few points that *DiFranco* and *Cassidy* agreed on was that an impairment need not be permanent to qualify as threshold injury.** *DiFranco* at 70.

5. 1995 PA 222 - Amendment to the Michigan No Fault Act

Approximately nine years later, in 1995, the Michigan Legislature passed an amendment to the Michigan No-Fault Act, that being 1995 PA 222. In pertinent part, MCL 500.3135 as amended reads as follows:

(1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(2) For a cause of action for damages pursuant to subsection (1) filed on or after 120 days after the effective date of this subsection, all of the following apply:

(a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(I) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

(7) As used in this section, "serious impairment of body function" means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.

MCL 500.3135. This amendment provided the first ever statutory definition of "serious impairment of body function." at MCL 500.3135(7).

C. Statutory Construction

Michigan law with respect to statutory construction is longstanding and steadfast. When interpreting statutes, the primary goal of this Court is to discern and give effect to the intent of the Legislature as expressed in the statutory language. *Gladych v New Family Homes, Inc.*, 468 Mich 594, 664 NW2d 705 (2003); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236, 596 NW2d 119 (1999). "We begin by examining the statutory language, and we must consider the context in which the language is used." *LeRoux v Secretary of State*, 465 Mich 594, 616, 640 NW2d 849 (2002). This Court in *Advisory Opinion re Constitutionality of 1972 PA 294* previously discussed, cited the instruction found at MCL 8.3a that "All words and phrases shall be construed and understood according to the common and approved usage of the language." *Id.* At 478. When a word is not

defined in the statute, this Court may consult dictionary definitions. *Oakland Co. Road Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 604, 575 NW2d 751 (1998); *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 470, 521 NW2d 831 (1994). This Court "must presume that every word has some meaning, and if possible, effect should be given to each provision." *People v Borchard-Ruhland*, 460 Mich 278, 597 NW2d 1 (1999) In interpreting the statute at issue, this Court "must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Sweatt v Dept. Of Corrections*, 468 Mich 172, 661 NW2d 201 (2003).

In *Nawrocki v Macomb County Road Commission*, 463 Mich 143, 615 NW2d 702 (2000), this Court explained the limited circumstances under which a court may look outside the language of the statute itself to investigate the legislative intent. *Nawrocki* held, "It is a fundamental principle of statutory construction that the words used by the Legislature shall be given their common and ordinary meaning, and **only** where the statutory language is ambiguous may the court look outside the statute to ascertain the Legislature's intent." *Id.* (Emphasis added) If the statute's language is clear and unambiguous, then it is assumed that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562, 621 NW2d 702 (2001). Under these circumstances, "judicial construction is normally neither necessary nor permitted." *Nat'l Exposition Co. v Detroit*, 169 Mich App 25, 29, 425 NW2d 497 (1988). In other words, only if the language of a statute is ambiguous may a court engage in an investigation in order to ascertain what the Legislature meant by the statute.

Defendants-Appellants have made no assertion throughout their Brief that the language of MCL 500.3135(7) is ambiguous, so this Court is not permitted to engage in an investigation outside

the plain language of the statute to ascertain Legislative intent. However, in support of Defendants-Appellant's assertion that in enacting MCL 500.3135(7) the Legislature intended to re-adopt the objective "life impact" standard in *Cassidy*, both they and Defense Amicus IIM have cited to a Legislative Analysis Bill related to 222 PA 1995. [Def Brief p 9][IIM Brief p 17] Besides Defendants-Appellants themselves acknowledging that "legislative analysis is not controlling on the question of legislative intent", this Court has made it clear that "in Michigan, a **legislative analysis is a feeble indicator of legislative intent** and is therefore a generally **unpersuasive** tool of statutory construction." [Def Brief p 9 fnt 5] *Lynch & Co. v Flex Technologies, Inc.*, 463 Mich 578, 587, 624 NW2d 180 (2001). Even in the federal context it has been noted that "resort to 'legislative history' in the search for legislative intent is a perilous venture." *Marposs Corp. v Troy*, 204 Mich App 156, 167-168, n 2, 514 N.W.2d 202 (1994) (Taylor, P.J., dissenting)(quoting Address by Justice Antonin Scalia before the Attorney General's Conference on Economic Liberties, June 14, 1986). "This enterprise is doubly fraught with danger in Michigan which, unlike Congress, has failed to create an authoritative legislative record." *Id.* "The problem with relying on bill analyses is that they do not necessarily represent the views of even a single legislator. Rather, they are prepared by House and Senate staff. Indeed, the analyses themselves note that they do not constitute an official statement of legislative intent." *People v Tolbert*, 216 Mich App 353, 360, n 5, 549 NW2d 61 (1996).

1. **In Enacting MCL 500.3135(7) Which Defined "Serious Impairment Of Body Function" As Requiring the Impairment To Affect The Persons General Ability To Lead "His Or Her" Normal Life, The Legislature Enacted A Subjective Standard As Opposed To Codifying The Objective Standard Set Forth In *Cassidy*.**

When the Legislature enacts legislation involving an area of the law where the appellate

courts of this State have rendered previous decisions, the Legislature is presumed to act with knowledge of the courts' interpretations. *Gordon Sel-Way v Spence Bros, Inc*, 438 Mich 488, 505-506, 475 NW2d 704 (1991); *Daniel v Dep't of Corrections*, 248 Mich App 95, 103-104, 638 NW2d 175 (2001). In 1995 the Legislature enacted legislation which defined "serious impairment of body function" as requiring the impairment to affect "the persons general ability to lead his or her normal life." MCL 500.3135(7). In doing so, the Legislature is presumed to have acted with knowledge of this Courts opinions in both *Cassidy* and *DiFranco*, issued in 1982 and 1986 respectively. As such, if the Legislature intended to return to *Cassidy*'s objective standard requiring the impairment to affect the persons general ability to lead "a" normal life, it would not have framed the statute to read as requiring the impairment to affect the persons general ability to lead "his or her" normal life, so as to set forth a subjective standard.⁵ In *May v Sommerfield*, 240 Mich App 504, 617 NW2d 920 (2000), the Court of Appeals confirmed that this definition of "serious impairment of body function" does indeed set forth a subjective standard to be used in determining whether one's general ability to lead his or her normal life had been affected by his or her impairments.

Further proof of the fact that MCL 500.3135(7) does not signify a return to the objective *Cassidy* standard can be found in the reasoning of the Court of Appeals in *Jackson v Nelson*, 252 Mich App 643, 654 NW2d 604 (2002). In *Jackson*, one of the issues before the court was whether the statutory definition of serious impairment required proof of a medically identifiable injury or

⁵This is precisely the reason why Defendants-Appellants reliance on *Rogers v City of Detroit* on page 9 of their Brief is misplaced. Unlike in *Rogers*, the past legislation construed by *Cassidy* was not retained by the Legislature. Instead of retaining the objective life impact standard of "a" normal life that *Cassidy* construed, the Legislature affirmative changed the language of the statute to read "his or her" normal life.

condition. *Id.* at 650. The court explained,

The Legislature, in defining "serious impairment of body function," relied on the terminology that the impairment must be "objectively manifested." As explained above, that phrase is terminology that our Supreme Court first articulated in *Cassidy* and then further refined in *DiFranco*. In the present case, we find that the trial court's interpretation of the Legislature's definition is flawed because it fails to acknowledge the judicial precedent for understanding and defining what the Legislature meant by an "objectively manifested impairment." Both *Cassidy*, 415 Mich. at 505, and *DiFranco*, 427 Mich. at 70, contemplated the injury being objectively manifested. In that regard, the *DiFranco* Court explained that a plaintiff's noneconomic losses must arise out of a "medically identifiable injury" *Id.* at 75. **The Legislature is presumed to have been aware that our Supreme Court in *DiFranco* construed the phrase "objectively manifested" to require proof that the injury is medically identifiable. The statute itself gives no indication that when incorporating that language the Legislature intended to change the law.** We believe that the Legislature's use of the phrase "objectively manifested" was intended to adopt the meaning of that term as set forth in *Cassidy* and *DiFranco*, and **had our Legislature intended a new interpretation, it would have adopted specific language clarifying that intent.** *Gordon Sel-Way, supra.*

Id. At 652-653. (Emphasis added). The difference between the statutory language pertaining to "objectively manifested" and "general ability to lead his or her normal life" is that as to the latter, the statute is sending a clear indication of an intent to change the law from what it was under *Cassidy*. The Legislature is presumed to have known of *Cassidy*'s objective requirement that the impairment affect one's general ability to lead "a" normal life when it promulgated the definition of "serious impairment of body function" found at MCL 500.3135(7). Contrary to the situation in *Jackson*, the fact that the statute explicitly changed the language to require the impairment to affect one's general ability to lead "his or her" normal life gives a clear and unambiguous indication of the Legislature's intent **not** to return to *Cassidy*'s objective requirement but instead opt for a subjective requirement. The specific change in the language from "a" to "his or her" clarifies the Legislature's intent to move in a new direction with a new interpretation in this area of the law.

Having laid out the background of the law, the current state of the law is a conglomeration of some principles taken from *Cassidy*, some from *DiFranco*, and some new principles gathered from legislative analysis and more recent case law interpreting MCL 500.3135. However, important to the issue presented to this Court in Defendants-Appellant's Brief on Appeal, it is perfectly clear that as of the 1995 amendments to the No Fault Act the proper "life impact" standard is subjective in nature and requires analysis of the injuries affect on one's general ability to lead **his or her** normal life, as MCL 500.3135(7) plainly and unambiguously states. This new subjective standard is grounded in the legislative analysis for the amendment, and was not previously propounded by neither *Cassidy* nor *DiFranco*. The only remnants of *Cassidy* which were carried over and codified into the 1995 amendments to the No Fault law were making the determination of a threshold injury an issue of law as opposed to an issue of fact unless there exists a material factual dispute as to the nature and extent of the injuries, as was codified at MCL 500.3135(2)(a), and the requirement that the body function affected be important, as was codified at MCL 500.3135(7)

D. The Three Elements To Establishing A "Serious Impairment Of Body Function."

1. Objectively Manifested Impairment

As of the 1995 amendments, there are three "elements" to establishing a "serious impairment of body function." First, the injury at issue must be "objectively manifested." MCL 500.3135(7). While *Cassidy* originated the "objectively manifested impairment" requirement, it did not expound on what the term meant and no Michigan Court of Appeals case prior to *Cassidy* set forth a concrete

definition of what the term meant either.⁶ However, *DiFranco* defined “objectively manifested” to mean a plaintiff must only submit evidence of a “medically identifiable injury” that establishes “a physical basis for their subjective complaints and pain.” *Id.* at 74-75.⁷ *DiFranco*’s definition of the “objective manifestation” requirement has never been challenged. To the contrary, many current Court of Appeals decisions have referred to the *DiFranco* definition and it is the definition used by the current Michigan Standard Jury Instructions.⁸ *Jackson* at 652-653; SJI2d 36.11.

2. Important Body Function

As for the second element, the injury at issue must affect an important body function. MCL 500.3135(7). The inclusion of the word “important, signifies a return to *Cassidy* on this element, but again *Cassidy* failed to explain which body functions are “important.” While there has not been an

⁶The Michigan Court of Appeals case of *Williams v Payne*, 131 Mich App 403, 346 NW2d 564 (1984) found that the plaintiff’s injuries were not objectively manifested because they “were not subject to medical measurement.” *Id.* at 409. However, the court also acknowledged that “The *Cassidy* opinion did not expressly designate which standard of manifestation to employ, objective medical measurements of injury or a patient’s complaints of pain substantiated only by the patient’s limited activities.” *Williams* at 410.

⁷This overruled the interpretation of *Cassidy*’s “objectively manifested injury” requirement as adopted in *Williams v Payne*, 131 Mich App 403, 346 NW2d 564 (1984), one of the numerous post-*Cassidy* era Court of Appeals decisions as mentioned earlier. The court in *DiFranco* found that *Williams* had misinterpreted *Cassidy* in that “Neither *Cassidy* nor S 3135(1) limits recovery of noneconomic damages to plaintiffs whose injuries can be seen or felt.” *DiFranco* at 74-75.

⁸SJI 36.11 reads in pertinent part:

“In order for an impairment to be objectively manifested, there must be a **medically identifiable injury or condition** that has a physical basis.” (Emphasis added).

opinion since *Cassidy* which really defined what an “important body function” is, there have been certain body functions which Michigan courts have found to meet this standard, including among others the ability to move one’s back (*Harris v Lemicex*, 152 Mich App 149, 393 NW2d 559 (1986); *Argenta v Shahan*, 135 Mich App 477, 488, 354 NW2d 796 (1984), the ability to walk (*Cassidy, supra*; *Kern v Blethen-Coluni*, 240 Mich App 333, 342, 612 NW2d 838 (2000), memory (*Shaw v Martin*, 155 Mich App 89, 94 (1986)), the ability to move one’s neck (*Meklrir v Bigham*, 147 Mich App 716, 720 (1985)), the ability to move one’s hand (*Meklrir v Bigham*, 147 Mich App 716, 720 (1985)), the proper functioning of one’s shoulder (*Arabo v Turnbell*, 157 Mich App 575 (1986)), the function of the heart and lungs (*Kanaziz v Rounds*, 153 Mich App 180 (1986); *Range v Gorosh*, 140 Mich App 712 (1984)), the function of the brain (*Shaw v Martin*, 155 Mich App 89 (1986); *Luce v Gerow*, 89 Mich App 546 (1979)), and the ability to lift. (*DiFranco* at 91.; *See also Kucera v Norton*, 140 Mich App 156, 159 (1984)).

It must be noted with respect to the case at bar, the Michigan Court of Appeals has previously found that “movement of ones hand is an important body function for purposes of threshold requirement that person injured in vehicle accident prove serious impairment of important bodily function to be permitted to maintain action in tort to recover for noneconomic damages under the No-Fault Act.” *Meklrir v Bigham*, 147 Mich App 716, 720, 383 NW2d 95 (1985). See also *Hicks v Mumin*, 2001 WL 789223 (Mich.App.)[10b-11b]; *Braden v Lee*, 133 Mich App 215, 348 NW2d 63 (1984) This is a logical conclusion as the movement of one’s hand is integral in assisting one to live a normal life as most everyday duties and activities necessitate the use of one’s hands. Another opinion has held that when it comes to hand injuries, the sense of touch is also an important body function. *Kosack v Moore*, 144 Mich App 485, 375 NW2d 742 (1985).

3. Impairment Must Affect The Persons General Ability To Lead His Or Her Normal Life

The third and final element requires that the impairment affect the “person’s general ability to lead his or her normal life.” MCL 500.3135(7). As discussed previously, this provision of the amended No-Fault Act, **subjectively** focusing on the individual plaintiff’s ability to lead “**his or her**” own normal life, supercedes *Cassidy*’s **objective** standard which focused on plaintiff’s ability to live “**a**” normal life. See *May v Sommerfield*, 240 Mich App 504, 617 NW2d 920 (2000); *Cassidy* at 505. This material change in the language reflects the Legislature’s apparent intent not to adopt the objective *Cassidy* standard focusing on “a” normal life which was criticized and later overruled in *DiFranco*. (See previous discussion at section C1 of this Brief) The Legislature did not adopt *DiFranco*’s approach of entirely discarding any “life impact” either. Instead, as is clear from the plain and unambiguous language of MCL 500.3135(7), the Legislature chose to codify a subjective standard focusing on what makes up the individual plaintiff’s own normal life.

Defendants-Appellants argument on appeal is that Plaintiff-Appellee’s injuries to his left hand do not rise to the level of a serious impairment of body function pursuant to MCL 500.3135, and therefore the Court of Appeals was in error in holding to the contrary in its opinion on remand. While Defendants-Appellants argument is misguided on multiple levels, perhaps the largest defect with the argument is Defendants-Appellants belief that “In 1995 P.A. 222, MCL 500.3135(7), the Legislature re-adopted the objective ‘general ability’ to lead one’s normal life test which had been the law under *Cassidy v McGovern*,”⁹[Def Brief, p 5] Defendants-Appellants go onto assert or imply

⁹The only case law that Defendants-Appellants cite in support of their proposition that MCL 500.3135(7) signifies a return to *Cassidy*’s objective “life impact” test is *Kern v Blethen*-

that MCL 500.3135(7) signifies a return to the *Cassidy* test throughout the remainder of his Brief, including a mention of *DiFranco* and then concluding that “In the face of two clear choices, the Legislature in 1995 re-adopted the high threshold required by *Cassidy*.” [Def Brief, p 5,10,14] As this Brief has gone into great lengths to make clear, in drafting MCL 500.3135(7) to require that the claimed impairment affect the persons general ability to lead his or her normal life, the Legislature signaled its intention to adopt a subjective standard which is in contrast to both *Cassidy* and *DiFranco*.

Contrary to Defendants-Appellant’s implication that the change in language from “a normal life” to “his or her normal life” carries little if any significance, this distinction is critical because in subjectively focusing on the effect of the injury on the plaintiff’s general ability to live his or her own normal life, it is proper for the court to compare the plaintiff’s own unique lifestyle before and after the accident. [Def Brief p 8, fnt 4] *May, supra*. If the accident related injuries have had **any** affect on the plaintiff’s general ability to lead his normal life, then the plaintiff has satisfied the third element of the test. In making it’s determination as to the effect on, this Court should heed its earlier decisions in both *Cassidy* and *DiFranco* which both explicitly stated that regardless of whether a plaintiff has made a good recovery, **“an injury need not be permanent to be serious.”** *Cassidy* at 505; *DiFranco* at 40. (Emphasis added).

As the statute states, this third element requires that the impairments affect the plaintiff’s

Columi, 240 Mich App 333, 612 NW2d 838 (2000) in footnote 8 at page 26 of their Brief. What Defendants-Appellants fail to also point out about *Kern* is that while the Court did make such mention, the Court did not reach the “life affect” element because the court had already decided that the fractured femur which the Plaintiff suffered qualified as a serious impairment of body function as a matter of law.

“general ability” to lead his or her normal life. MCL 500.3135(7). The qualifiers “general ability” first appeared in the *Cassidy* decision as part of it’s holding that an objective standard is to be used which evaluates the effect of the injury on the person’s “general ability” to live a normal life. *Id.* at 505. *Cassidy* was completely silent on what was meant by “general ability” and in the twenty one plus years since *Cassidy* was decided, there has been no meaningful discussion by any appellate court decision in Michigan as to the interpretation or meaning of “general ability”. Many times, mention of the term “general ability” is either not made at all or the only mention of the term “general ability” is found in the court’s recitation of MCL 500.3135(7) as the controlling standard and the term is never referred to again in the analysis of the merits. *See Williams v Payne*, 131 Mich App 403, 346 NW2d 564 (1984)(no mention of “general ability” in the opinion); *Sherrell v Bugaski*, 140 Mich App 708 (1984)(no mention of “general ability” in the analysis after mentioning it earlier in opinion)

Based on the failure of any appellate decision to place any importance on the word “general” to qualify the word ability in undertaking an analysis of the “life impact” element, Plaintiff-Appellee submits that the word “general” adds little or no meaning to the rest of the statute. Defendants-Appellants, on the other hand, argue that the term “general” is the “touchstone of the test”, and claims that in remand opinion in the case at bar, “the ‘general ability’ portion of the statute is effectively being rewritten by the Court of Appeals as simply an incursion on the ‘ability’, sans ‘general’, to lead a normal life.” [Def Brief p 15] In any event, if this Court does choose to consult a dictionary in an effort to give effect to the word “general” as it qualifies the word “ability”, a thorough examination of the past decades worth of opinions issued by this Court in which a dictionary was consulted has revealed that only one of those dictionaries used by this Court not only

defines “general” and “ability” but also has a separate definition of “general ability”, noted as a related phrase to the word “general.” That dictionary is Webster’s Third New International Dictionary, Unabridged, 1971, as used by this Court in the matters of *Lytle v Malady*, 458 Mich 153, 579 NW2d 906 (1998) and *Rednour v Hastings Mutual Insurance Company*, 468 Mich 241, 661 NW2d 562 (2003). The pertinent definition of the adjective “general” is stated as “marked by broad overall character without being limited, modified, or checked by narrow precise considerations : concerned with main elements, major matters rather than limited details, or universals rather than particulars : approximate rather than strictly accurate.” Webster’s Third New International Dictionary, Unabridged, 1971, def. 4. [4b] The pertinent definition of the noun “ability” is stated as “the quality or state of being able : physical, mental, or legal power to perform : competence in doing : SKILL” Webster’s Third New International Dictionary, Unabridged, 1971, def. 1. [5b] Interestingly, the definition of the related phrase and noun “general ability” is simply stated as “ability”, so as to reflect the insignificance of the word “general” in the scope of the phrase. Webster’s Third New International Dictionary, Unabridged, 1971, def. 1. [6b] It appears from the definition of “general ability” that if in fact the Court of Appeals is rewriting the “general ability” portion of the statute to focus simply on “ability” as Defendants-Appellants have argued, the Court of Appeals will be doing nothing more than interpreting the term the exact same way that Webster’s has defined it. Thus, pursuant to the above definitions, if a plaintiff can demonstrate that the impairment affects his or her “quality or state of being able” to lead his or her normal life, then an affect on the “general ability” to do so will have been shown.

In making it’s determination as to whether the Michigan Court of Appeals on remand arrived at the proper conclusion that Plaintiff-Appellee did in fact meet the “serious impairment of body

function” threshold, this Court should keep in mind the following commentary it made in *DiFranco* on the “threshold injury” standard in general, which applies with equal force to the current language of MCL 500.3135:

The ‘serious impairment of body function’ threshold is a significant, but not extraordinarily high, threshold. The three threshold injuries listed in S 3135(1) are not equivalent in severity. No disfigurement or injury is comparable to death. The ‘permanent serious disfigurement’ and ‘serious impairment of body function’ thresholds are not equivalent since the former contains a significant additional requirement--permanency. The Legislature refused to add this requirement to the latter threshold. The ‘serious impairment of body function’ threshold was designed to eliminate suits based on clearly minor injuries, and those injuries which did not seriously affect the ability of the body, in whole or in part, to function.

DiFranco at 60. If this Court agrees with the Court of Appeals opinion on remand concluding that Plaintiff-Appellee has met this “significant, but not extraordinarily high, threshold”, this Court must affirm the Court of Appeals decision.

This Court should also keep in mind that while *Cassidy* and *DiFranco* “disagreed” on a majority of their holdings, in both cases this Court held that an injury need not be permanent to qualify as a threshold injury. *Cassidy* at 505; *DiFranco* at 40. Also, Plaintiff-Appellee reminds this Court of it’s holding in *Byer*, that once a plaintiff proves that he has suffered a serious impairment of body function, he can recover all of his noneconomic losses, even for periods when the impairment is no longer serious. *Id.* MCL 500.3135(7) gives no indication that these two holdings are no longer viable. Taken together, it logically follows from these holdings that this Court never intended on penalizing a plaintiff for attempting to make a recovery from a threshold injury, nor to overlook an otherwise qualifying injury due to the fact that a plaintiff may have recovered in a shortened length of time.

E. A Serious Affect, Nor Any Other Requirements, Limitations Or Otherwise Not Included Within The Plain And Unambiguous Language Of MCL 500.3135(7) Are Not Required To Be Proven By A Plaintiff In Order To Qualify As Having Suffered A Serious Impairment Of Body Function.

One of Defendant's Appellant's allegations of error attributed to the Court of Appeals opinion on remand in the case at bar is that the Court of Appeals misapplied the third prong of the "serious impairment of body function" test because "the 'general ability' test requires the injury be so serious as to have a pervasive effect on the person's life as whole, cutting across all or nearly all life's activities" or that the persons general ability to lead his normal life must be "significantly altered." [Def Brief p 6,19]

This Honorable Court has already addressed the issue as to whether a "serious" affect on a plaintiff's general ability to lead his normal life is required in order to qualify as a threshold injury in its April 9, 2003 Order of remand issued in *Kreiner v Fischer*, as referenced in the June 12, 2003 Order of remand issued in the case at bar. [15a] Within that Order, this Court explicitly stated that as to the "life impact" element of the test, "Although a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one's *general* ability to lead his normal life." [15a] (Emphasis in original). The Court of Appeals subsequently confirmed this Court's statement that a serious effect is not required in its opinion on remand in *Kreiner* on June 3, 2003, holding that MCL 500.3135(7) unambiguously defines a "serious impairment of body function" as an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life. *Kreiner v Fischer* 256 Mich App 680, 671 NW2d 95 (2003) "The definition does not require any additional proof. It would be improper for us to read any more requirements,

limitations, or language into the unambiguous statutory definition.¹⁰ *Id* Further, the word “serious” was included in the term “serious impairment of body function” found at MCL 500.3135(7) Thus, the definition of “serious impairment of body function” found at MCL 500.3135(7) being “an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life”, incorporates the term “serious”, so no additional “serious” requirements outside the language of the definition are necessary. If a plaintiff proves that he or she has suffered “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life”, they have satisfied any showing of seriousness that the term “serious impairment of body function” implies.

Nowhere in the definition of “serious impairment of body function” at MCL 500.3135(7) do the words require the injuries to “be so serious as to have a pervasive effect on the person’s life as a whole, cutting across all or nearly all life’s activities” or that the persons general ability to lead his normal life must be “significantly altered.”, as Defendants-Appellants seek this Court to impose. Thus, as this Court has already made clear in it’s Order of remand, Plaintiff-Appellee is under no such burden of proof. As *Kreiner* on remand made clear, and consistent with principles of statutory construction previously discussed in this Brief, if Plaintiff-Appellee was successful in proving to the Court of Appeals on remand that the impairments from which suffered affected his “general ability to lead his normal life”, he has satisfied the element of the test which is at issue on this appeal.

¹⁰Defense Amicus IIM also argues for a “list of objective factors” to be used in evaluating a plaintiffs “ability” to return to his pre-accident life. The factors that IIM argues for are the very “serious” factors that *Kreiner* deemed inapplicable, and not one of the factors can be found in the plain and unambiguous language of MCL 500.3135(7) which authoritatively sets forth the sole requirements for proving a “serious impairment of body function.” .

F. Pursuant To MCL 500.3135(7), The Michigan Court Of Appeals, As Instructed By this Honorable Court In It's Order Of Remand Dated June 12, 2003, Properly Analyzed Whether Plaintiff-Appellee's Impairments Affected His "General" Ability To Lead His Normal Life By Properly Comparing Plaintiff-Appellee's Lifestyle Before And After The Accident, Taking Into Consideration The Effect On His Employment, Guitar Playing, Performing Numerous Household And Personal Tasks, Operating His Bow Shop, Processing Deer, And His Inability To Completely Open His Left Hand, And In Doing So Committed No Error In Determining That The Impairments Did In Fact Affect His General Ability To Lead His Normal Life.

In this Court's remand order in *Kreiner*, which was the order that the case at bar was remanded to the Court of Appeals pursuant to, it was held that in reaching a determination as to whether an impairment has affected one's general ability to lead his normal life, "Although a *serious* effect is not required, *any* effect does not suffice either. Instead the effect must be on one's *general* ability to lead his normal life." [15a](emphasis in original). Thus, the **sole** issue before the Court of Appeals on remand was whether Plaintiff-Appellees impairments affected his general ability to lead his normal life.

Defendants-Appellants argues that the Court of Appeals in it's opinion on remand was incorrect in its conclusion that Plaintiff-Appellees injuries met the "life impact" element of MCL 500.3135 in finding that Plaintiff-Appellees impairments "affected his general ability to lead his normal life." While Defendants-Appellants characterized the initial Court of Appeals opinion as improperly focusing primarily on Plaintiff-Appellees four month inability to play bass guitar in his band, both they and Defense Amicus IIM label the decision on remand as improperly emphasizing his inability to return to work. [Def Brief p 17][Def Amicus Brief p 47] Defendants-Appellants characterizes the decision on remand as having "eroded the 'general ability' test to the point that any minor injury with temporary loss of work and some incursions on lifestyle activities is a threshold injury." or in finding that "a short term loss of employment or short-term limitation on lifestyle is

sufficient.”¹¹ [Def Brief p 15] Besides basing this argument on an improper standard as discussed previously in this Brief, this argument is also based on a complete failure to acknowledge the multitude of additional factors which the Court of Appeals considered, over and above employment and guitar playing, in reaching it’s decision that the impairments affected Plaintiff-Appellees general ability to lead his normal life.¹²

Plaintiff-Appellee had provided the Court of Appeals with substantial evidence that his general ability to lead his normal life was affected, as the injuries to his little finger and tendon damage to his ring and middle fingers rendered his left hand virtually useless of over three months after the accident. Without the use of his left hand, Plaintiff-Appellee was without the ability to

¹²Defendants-Appellants cite three Court of Appeals decisions which they claim support the conclusion that Plaintiff-Appellee “does not meet the tort threshold.” [Def Brief p 30] However, these cases do not stand for this proposition or are significantly different factually from the case at bar.

Braden is distinguishable as it was decided under the since overruled *Cassidy* decision, prior to the enactment of MCL 500.3135(7), and the court stated that “Plaintiff was not incapacitated by his injuries nor did they interfere in any significant manner with his normal life style.” *Braden* at 218. This decision would not stand after the enactment of MCL 500.3135(7) as the decision sets out requirements that are not in the plain language of the statute, namely “incapacitation”, “interfere in any significant manner”, and “normal life style.”

Ulery was likewise decided under the since overruled *Cassidy* decision and relied on the above distinguished *Braden* in stating “we do not find that such difficulties interfered ‘in any significant manner’ with plaintiff’s normal life style, as required under this Court’s opinion in *Braden*.” *Ulery* at 554.

Finally, *Williams* was likewise decided under the since overruled *Cassidy* decision, and further it found that the plaintiff did not meet the threshold because the injuries “did not *seriously impair* any important body functions.” *Williams* at 409. (Emphasis in original). This Court in it’s order of remand has already confirmed that a “serious” effect is not required to satisfy the threshold.

grasp, grip, lift, hold, pull and every other vital use to which a hand is made to function. Plaintiff-Appellee provided evidence that he was unable to return to his job as a cable line worker until around the third week of November of 1999 working 20 or 25 hours per week, during which he only did "leg-work" and avoided all use of his left hand, as advised by his doctor. [39a,42a] [27a] Plaintiff-Appellee was not released to full time work without restriction until December 14th, 1999. [27a,28a]

Another important aspect of Plaintiff-Appellee's normal life which has been significantly effected by his hand injury as presented to the Court of Appeals is his ability to play the bass guitar, which he had been playing for 10 years, and played for the band "Summer Rain" at the time of the accident as he had been since May of 1998. [34a] He would practice three or four times a week and play shows every weekend on both Friday and Saturday nights, performing mostly in nightclubs and private clubs, making \$150.00 to \$200.00 per week. [34a,41a] However, due to the injuries to the fingers on his left hand, he was rendered unable to play the "frets" on the neck of the guitar until the middle of January of 2000 after missing approximately 15 or 20 shows. [39a,42a] Further, even though he returned to the band, he had to adapt to a different finger formation to compensate for his middle finger's inability to reach the second fret. which still resulted in sore fingers at the end of a night of playing [42a]

The Court of Appeals was presented with evidence that living alone, Plaintiff-Appellee was solely responsible for all household duties, including maintenance of his 2.3 acre yard. [40a] Among other things, Plaintiff-Appellee was unable to wash his dishes, mow his extensive lawn, operate his weed whacker or perform other standard maintenance of his yard which required two functional hands. [43a-44a] In addition to his home, Plaintiff-Appellee also maintains a "shop building" on his

property where he repairs bow's and makes practice arrows for deer hunting, and also processes deer for deer hunters. [40a] [43a-44a] At the time of the accident, Plaintiff-Appellee had planned on making some repairs to this building, but was unable to do repairs after the accident because he was physically unable with his hand. [42a] [43a-44a] Plaintiff-Appellee was also unable to partake in any of his operations throughout the entire deer season of 1999. Without being able to use both of his hands, it was impossible for Plaintiff-Appellant to neither repair bows and make practice arrows for deer hunters, nor process their deer for them after they had been hunted. As his left hand was not semi-functional again until late December of 1999, it was too late for him to undertake these activities for the deer season of 1999. [43a-44a]

Finally, the Court of Appeals was made aware that Plaintiff-Appellee could not even perform the simplest functions involving two hands, including buttoning his shirts and pants, and had a difficult time showering. [43a-44a]

Defendants-Appellants has criticized the Court of Appeals conclusion on remand that the numerous above referenced limitations affected Plaintiff-Appellee's "general" ability to lead his normal life. Among other things, Defendants-Appellant alleges the Court of Appeals has primarily emphasized loss of employment, and has essentially "looked for any incursion on lifestyle , and if coupled with a minor but objective injury and temporary loss of work (a preeminent consideration according to the Court of Appeals because work is the usual activity of most people), incorrectly found a threshold injury." [Def Brief p 20] Essentially, Defendants-Appellants argue that in this alleged approach, the Court of Appeals erred in not fully considering the affect of Plaintiff-

Appellee's injuries on his "general" ability to lead his normal life as a whole.¹³

However, this Court need only look to the Court of Appeals opinion on remand to see the considered and methodical approach the Court of Appeals took, consistent with previous case law, in setting forth what made up Plaintiff-Appellee's normal life prior to the accident, and then reviewing the vast variety of ways that his normal life was affected by the impairments in reaching it's conclusion that the impairments did in fact did affect his "general" ability to lead his normal life. Contrary to Defendant-Appellant's assertions, the Court of Appeals was not "confused", but quite the contrary. [Def Brief p 22] The Court of Appeals thoroughly analyzed the affects that the

¹³Plaintiff-Appellee would like to point out that even if the Court of Appeals did consider only the time missed from working on cable lines and the time missed with his band, Defendant-Appellants are still hard pressed to prove to this Court that given the significant time that Plaintiff-Appellee spent in his life pursuing and performing these activities, this does not constitute an affect on his general ability to live his normal life! As *Kreiner* pointed out in footnote 6,

Plaintiff's normal life consisted of, in large part, working as a carpenter. Plaintiff's employment was not an insignificant and occasional event in his life but was instead a part of his normal routine. If plaintiff's testimony is true, the impairment "affected" his general ability to lead his normal life by limiting his activities as a carpenter. Plaintiff's ability to work a full eight-hour day was reduced by twenty-five percent, and he testified he could no longer accept roofing jobs. Plaintiff was allegedly further limited in performing his job by weight and movement restrictions.

Id. This proposition was affirmed in a recent Court of Appeals decision of *Shively v Bogias*, 2002 WL 31941532 (Mich App, 2002)[12b-13b]which cited to this footnote, stating "Where a person's normal life consists in large part of his work, an injury's impact on his work routine may establish that the impairment affects the person's general ability to lead his normal life. *Kreiner, supra*, 519 n 6." *Id.*

impairments had not only on Plaintiff-Appellees employment, but as the Court of Appeals “read the Supreme Court’s remand order as instructing us to consider all aspects of Plaintiff’s life”, the Court of Appeals also considered the affect on all aspects of his normal life including his home life, hobbies, daily activities, and recreational activities among others. In arguing that the Court of Appeals erroneously treated loss of work as the primary determinant of the tort threshold, Defendants-Appellants are ignoring the majority of the opinion’s analysis and careful consideration of the affect the impairments had on Plaintiff-Appellee’s normal life as a whole, and in so doing are flawed in their allegation of error.

The Court of Appeals opinion on remand commenced with it’s acknowledging of this Honorable Court’s order remanding the matter back to it for consideration in light of this Court’s order in *Kreiner*, which would require the Court of Appeals to consider whether Plaintiff-Appellee’s impairment affects his “general” ability to lead his normal life. [15a]

The Court of Appeals then, after summarizing Plaintiff-Appellees injuries and treatment, cited MCL 500.3135(7) for the statutory definition of a “serious impairment of body function” as being ““an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.”” [17a] Based on the plain and unambiguous language of the statute, the Court of Appeals duly stated;

So, the existence of an impairment of an important body function is measured by an objective standard and the **affect of the impairment on the injured person is measured by a subjective standard.**

[17a](Emphasis added) Thus, The Court of Appeals properly framed the issue set before it by this Honorable Court in it’s order of remand as being “whether plaintiff’s injuries affected his *general* ability to lead *his* normal life.” [17a](Emphasis in original). “In measuring the effect of the

impairment on the injured person's general ability to lead his or her normal life, it is appropriate to compare the person's 'lifestyle before and after the accident'" [18a]; *citing May v Sommerfield (After Remand)*, 240 Mich App 504,506, 617 NW2d 920 (2000)] In this regard, the **Court of Appeals noted that by applying an objective standard to this issue, the trial court erred in relying on case law that was decided "before the 1995 amendments to Michigan's No-Fault Act defined 'serious impairment of body function.'"** [17a](Emphasis added)

After reiterating the longstanding tenant that an injury need not be permanent in order to constitute a serious impairment of body function, the Court of Appeals specifically stated,

our finding that plaintiff's injuries affected his general ability to lead his normal life **is not based on one factor, but rather many.** We read the Supreme Court's remand order as instructing us to **consider all aspects of plaintiff's life, including employment, home life, relationships, daily activities, and recreational activities.**

[18a]

The Court of Appeals then looked at Plaintiff-Appellee's normal life prior to the accident, noting that he worked full time as a cable lineman, played the bass guitar in a band that performed on Friday and Saturday nights and practiced three to four days per week, that he lived alone and was solely responsible for maintaining his house and property and performing personal tasks. In looking at the result of the injuries, the Court stated

plaintiff completely lost the use of his left hand for three months. Plaintiff was off work from his employment as a 'cable lineman' until he returned to work part time in November 1999 with instructions from his doctor not to use his left hand. Plaintiff's injuries also prevented him from playing the guitar. And he could not perform or had significant difficulty performing household and personal tasks, such as washing dishes, doing yard work, and showering and dressing himself, until December 1999. In addition, plaintiff had difficulty operating his 'bow shop' and processing deer during the 1999 deer season. Plaintiff returned to work full-time as a cable lineman on December 14, 1999, but was unable to play in the band until mid-January 2000 because he 'didn't have the strength in [his] fingers. They wouldn't

work.’ When plaintiff did begin to play the guitar again, he had to change his finger formation to accommodate his inability to completely straighten his left middle finger.

[18a]

The Court of Appeals concluded, “In this case, plaintiff lost the use of his left hand for three months, which significantly affected plaintiff’s general ability to lead his normal life given the work and tasks that he performed before the accident ‘in his normal life.’ And so, we conclude as a matter of law that plaintiff suffered ‘serious impairment of body function’ as defined by MCL 500.3135(7).”

[19a]

Contrary to Defendants-Appellants assertions, the Court of Appeals did not reach the conclusion that Plaintiff-Appellee’s general ability to lead his normal life was affected by placing undue or extraordinary weight to the fact that he lost time from work. In explaining one’s employment as **but one factor** in deciding whether one’s general ability to lead his normal life has been affected, the Court of Appeals explained,

As this Court stated in *Kreiner (On Remand)*, *supra* at 688, ‘Employment or one’s livelihood, for a vast majority of people, constitutes an extremely important and major part of a person’s life. Whether it be wrong or right, our worth as individuals in society is often measured by our employment.’ As the *Kreiner* Court also recognized, ‘injuries affecting the ability to work, by their very nature, often place physical limitations on numerous aspects of a person’s life.’ *Id.* At 689.”

[18a]

Importantly, the Court of Appeals reemphasized yet again that **employment is but one factor to consider** in evaluating whether one’s general ability to lead his normal life was affected by stating,

We are not suggesting that any injury sustained from a motor vehicle collision that results in the plaintiff losing the ability to work constitutes ‘serious impairment of body function.’ But we are cognizant of the reality, as was this Court in *Kreiner (On Remand)*, *supra*, that such an injury ‘**under the right factual circumstances**, can be equated to affecting a person’s *general* ability to lead his or her normal life.’ *Id.* At 688. We find these circumstances exist here.

[19a](Italics in original).

As can be seen, the Court of Appeals issued a very methodological and reasoned approach to evaluating whether one’s general ability to lead his or her normal life has been affected. The Court of Appeals made it explicitly clear that in making such determination, a court must undergo an analysis of what constituted plaintiff’s “normal life” prior to the accident and then analyzing the effects on this “normal life” the injuries may have had on his or her “normal life”, consistent with the plain language of MCL 500.3135(7) evincing a subjective standard, and just as the court had held in *May*. The Court of Appeals made it clear that this analysis is not based on focusing on the affect on any one factor, but must be based on examining all aspects of the plaintiff’s normal life, including employment, home life, relationships, daily activities, and recreational activities. On remand, the Court of Appeals did in fact examine the affect the injuries had on all aspects of Plaintiff-Appellee’s normal life, including his employment, home life, hobbies, daily activities, and recreational activities among others, and reached the correct conclusion that Plaintiff-Appellee’s impairments did affect his general ability to lead his normal life. The analysis process utilized by the Court of Appeals serve as a prototype of how to utilize the subjective standard in first looking at the plaintiff’s “normal life” prior to the accident, and then analyzing the effect on his “normal life” after the accident.¹⁴

¹⁴As the Court of Appeals in it’s opinion on remand serves as a guide as to how the subjective standard is utilized to evaluate the issue as to whether one’s injuries have affected his or her general ability to lead his other normal life, and is consistent with both the plain language

Based on all of the above referenced evidence with the Court of Appeals had before it, and contrary to Defendants-Appellants assertions, **explicitly mentioned and took into consideration**, it cannot be said that the Court of Appeals did not “consider the effect of the injury on the persons’ life as a whole.” The range of activities that the Court of Appeals considered, as shown above, affected virtually every facet of Plaintiff-Appellees ability to lead what constituted his normal life. These affected activities ranged from his employment, hobbies, household chores, yard work, home maintenance, operating a side bowhunting supply and deer processing shop, to simple things like personal hygiene and getting dressed! Importantly, this Court must keep in mind that the standard is a subjective one, focusing on the specific person’s ability to lead his or her normal life. In comparing Plaintiff-Appellees lifestyle before and after the accident, it is plainly clear that virtually

of MCL 500.3135(7) and the case law decided after the 1995 amendments to the No Fault Act, there is no need for this Honorable Court to formulate a new and different standard. Besides this would go against the longstanding tenant of the law that the judiciary “is not in the business of legislation, the current standard is subjective based on a plain reading of the plain and unambiguous language. This means that each case will turn on it’s individual factual basis as no two persons “normal lives” will be the same, nor will the affects on their “normal lives.” For this very reason, a bright line rule such as the “eventual return to work within 3 years” test which Defendants-Appellants propose in their Brief is inappropriate because it attempts to add an objective bright line rule to a portion of a statute which plainly provides and has been interpreted by case law to be a subjective test. Even the *Cassidy* opinion which Defendants-Appellants champion stated that the “serious impairment of body function” test would have to develop on a “case by case basis.” *Cassidy* at 502-503. Further, under no conceivable reading of MCL 500.3135(7) can one even come close to interpreting the language as directing this type of a test! Finally, keep in mind this Court’s holding that an injury need not be permanent to qualify as a ‘threshold injury.’ This Court would be hard pressed to devise any type of injury which would incapacitate someone from working for over three years that was not a permanent injury. To adopt such a three year rule would render this Courts previous permanency holdings meaningless.

every aspect of his ability to lead his normal life was affected, let alone a “general” ability. For that reason, and as discussed in this Response, the Court of Appeals reached the correct conclusion that Plaintiff-Appellee’s impairments affected his general ability to lead his normal life.

Contrary to Defendants-Appellants assertions, the opinion on remand makes clear that the Court of Appeals did consider each of the above affects in reaching it’s decision, and did not limit it’s analysis to solely employment or any other sole factor. It is clear that in referring to what constituted Plaintiff-Appellee’s “normal life” prior to the accident and then analyzing the multitude of affects the impairments had on his general ability to lead his normal life after the accident, the affect on Plaintiff-Appellee’s “general” ability to lead his normal life was considered. It is equally clear that the Court of Appeals employed the proper subjective standard, as is required by the plain language of MCL 500.3135(7), as opposed to the objective standard which Defendants-Appellants rely on, that was superceded by the aforementioned statute.

In reviewing the current state of the No Fault law, as pertinently explained previously in this Brief, this Court will find that the proper standard a court is to employ in determining wither a plaintiff has suffered a “threshold injury” is to determine whether the impaired important body function “affects the person's general ability to lead his or her normal life.” MCL 500.3135(7). For Defendants-Appellants to argue that the standard is objective, focusing on whether there is an affect on “the persons’s general ability to lead a normal life” as in *Cassidy* is contrary to the plain language of the statute and longstanding rules of statutory construction. As explained previous in this Brief, while the statute signified a return to *Cassidy* as to some points, such as making the determination a question of law for the court, it **did not** reinstate the *Cassidy* standard, as evidenced by the language of the statute. The Court of Appeals applied the correct subjective standard as mandated

by MCL 500.3135(7), as is evidenced throughout the rest of the opinion.

As such, the Court of Appeals did not err in reaching it's decision that Plaintiff-Appellees injuries qualified as a serious impairment of body function. To the contrary, the Court of Appeals did a noteworthy job of applying the standard as is plainly and unambiguously provided by MCL 500.3135(7) to the totality of the activities which were affected in Plaintiff-Appellees general ability to lead his normal life, and documented this process well in the text of it's opinion. Thus, Defendants-Appellants request for reversal must be denied and this Honorable Court must affirm the decision of the Court of Appeals.

II.

PURSUANT TO MICHIGAN LAW, IN FAILING TO RAISE THE ISSUE AS TO WHETHER PLAINTIFF-APPELLEE'S OBJECTIVELY MANIFESTED INJURIES IMPAIRED AN IMPORTANT BODY FUNCTION BEFORE NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS, THE ISSUE BEEN IMPROPERLY PRESERVED FOR APPEAL SO AS TO PRECLUDE DEFENDANTS-APPELLANTS FROM RAISING IT FOR THIS HONORABLE COURTS CONSIDERATION FOR THE FIRST TIME IN THIS APPEAL.

At various points throughout Defendants-Appellants Brief on Appeal, they imply or express disagreement with the view that Plaintiff-Appellees injuries have impaired an important body function.¹⁵ [Def Brief p 15-16, 28-31] A review by this Court of the record in this matter will reveal that this issue was never raised to the trial court, nor was it ever raised before the Court of Appeals

¹⁵As to the first and third elements of the "serious impairment of body function" test, Defendants-Appellants concede at footnote 3 on pg 8 of their Brief that the first element (objective manifestation) is not an issue in the case, and the third element (general ability to lead his normal life) is the only element at issue in the case, per this Court's June 12, 2003 order of remand.

at either time that this case was pending before that court. In so much as this can be viewed as an attempt to ask this Honorable Court to find that Plaintiff-Appellee has not demonstrated that an important body function was impaired, Plaintiff-Appellee submits that this issue has not been properly preserved for appeal as it is being raised for the very first time before this Honorable Court and therefore this Honorable Court should not consider the issue.

“As a general rule, issues not raised before the trial court are not properly preserved for appellate review.” *Phinney v Perlmutter*, 222 Mich App 513, 564 NW2d 532 (1997) (citing *People v Connor*, 209 Mich App 419, 422, 531 NW2d 734 (1995)).

If Defendants-Appellants were of the belief that Plaintiff-Appellees injuries failed to impair an important body function so as to fail to satisfy the second element of “serious impairment of body function”, the proper course of action was to raise the issue before the trial court. This was never done, so the issue was never preserved for appellate review. Now, as this matter has reached the highest Court in our State, is not the appropriate time to raise an issue for the first time.

RELIEF REQUESTED

Wherefore, Plaintiff-Appellee respectfully requests that this Honorable Court affirm the Michigan Court of Appeals September 16, 2003 opinion issued with respect to the case at bar, and remand this matter to the trial court for proceedings consistent with the opinion.

Respectfully submitted,

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